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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

GLOBAL ACQUISITIONS NETWORK, ) Case No. CV 12-08758 DDP (CWx)  
a Wyoming corporation; SHAWN )  
CORNEILLE, an individual, ) **ORDER GRANTING DEFENDANT BANK OF**  
 ) **AMERICA, N.A.'S MOTION TO DISMISS**  
Plaintiffs, ) **THE FIRST AMENDED COMPLAINT**  
 )  
v. ) [Dkt. No. 50]  
 )  
BANK OF AMERICA CORPORATION, )  
a Delaware corporation; )  
ORIANA CAPITAL PARTNERS, LLC, )  
a Connecticut limited )  
liability company; ZANCO, a )  
company of unknown business )  
form, HLB FINANCIAL, LLC, a )  
company of unknown form; W/C )  
INVESTMETN HOLDINGS INC., a )  
Florida corporatin; DEXTER )  
CHAPPELL, an individual; )  
VALERIE CHAPPELL, an )  
individual; JON LEARY, an )  
individual; GLEN McINERNEY )  
also known as LARRY BENNETT, )  
an individual; et al. )  
 )  
Defendants. )  
 )  
 )  
 )

Before the court is Defendant Bank of America, N.A. ("BANA")'s  
Motion to Dismiss the First Amended Complaint. Having considered  
the parties' submissions, the court adopts the following argument.

1 **I. Background**

2 The factual allegations in this action are presented at length  
3 in the court's Order Granting Defendants' Motion to Dismiss With  
4 Leave to Amend Certain Claims (the "Order"), dated February 19,  
5 2013. Because the basic allegations of the First Amended Complaint  
6 ("FAC") are identical, the court will not recite them again.

7 On February 19, 2013, the court granted Bank of America  
8 Corporation's Motion to Dismiss as to all claims, giving Plaintiffs  
9 leave to amend the four fraud-based claims (Claims 5, 6, 7, and 8)  
10 to meet Rule 9(b)'s particularity requirements and leave to amend  
11 the conspiracy claim (Claim 9).

12 **II. Legal Standard**

13 A complaint may be dismissed for failure to state a claim upon  
14 which relief can be granted. See Fed. R. Civ. P. 12(b)(6). "To  
15 survive a motion to dismiss, a complaint must contain sufficient  
16 factual matter, accepted as true, to 'state a claim to relief that  
17 is plausible on its face.' A claim has facial plausibility when  
18 the plaintiff pleads factual content that allows the court to draw  
19 the reasonable inference that the defendant is liable for the  
20 misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)  
21 (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

22 Although the court must accept as true all of the factual  
23 allegations in a complaint, that principle "is inapplicable to  
24 legal conclusions. Threadbare recitals of the elements of a cause  
25 of action, supported by mere conclusory statements, do not  
26 suffice." Id.

27 To determine whether a complaint states a claim sufficient to  
28 withstand dismissal, a court considers the contents of the

1 complaint and its attached exhibits, documents incorporated into  
2 the complaint by reference, and matters properly subject to  
3 judicial notice. Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551  
4 U.S. 308, 322-23 (2007); Lee v. City of Los Angeles, 250 F.3d 668,  
5 688 (9th Cir. 2001).

6 Where a motion to dismiss is granted, a district court should  
7 provide leave to amend unless it is clear that the complaint could  
8 not be saved by any amendment. Manzarek v. St. Paul Fire & Marine  
9 Ins. Co., 519 F.3d 1025, 1031 (9th Cir. 2008) (citation omitted).

### 10 **III. Discussion**

#### 11 **A. Negligence and Breach of Fiduciary Duty Claims**

12 Plaintiff concedes that the claims for negligence and breach  
13 of fiduciary duty were dismissed without leave to amend. These  
14 claims are therefore DISMISSED from the FAC.

#### 15 **B. Fraud-Based Claims**

16 "A cause of action for fraud requires the plaintiff to prove  
17 (a) a knowingly false misrepresentation by the defendant, (b) made  
18 with the intent to deceive or to induce reliance by the plaintiff,  
19 (c) justifiable reliance by the plaintiff, and (d) resulting  
20 damages." Glenn K. Jackson, 273 F.3d at 1201 (quoting Wilkins v.  
21 Nat'l Broad. Co., 71 Cal. App. 4th 1066 (Cal. Ct. App. 1999))  
22 (internal quotation marks omitted). The elements of a claim for  
23 fraud in the inducement of a contract are the same as for actual  
24 fraud. Rodriguez v. JP Morgan Chase & Co., 809 F. Supp. 2d 1291,  
25 1296 (citing Cal. Civ. Code § 1572; Zinn v. Ex-Cell-O Corp., 148  
26 Cal. App. 2d 56, 68 (Cal. Ct. App. 1957)). Negligent  
27 misrepresentation is a "species of the tort of deceit." Bily v.  
28 Arthur Young & Co., 3 Cal. 4th 370, 407 (1992). Justifiable

1 reliance on the misrepresentation by the plaintiff is a key element  
2 of a cause of action for negligent misrepresentation. Id. at 413.

3 BANA argues that Plaintiffs' fraud-based claims in the FAC  
4 should be dismissed because, as in the original Complaint,  
5 Plaintiffs fail to allege justifiable reliance and fail to plead  
6 their fraud claims with particularity.

7 **1. Justifiable Reliance**

8 The court's Order indicated that it was implausible that  
9 Plaintiffs could have relied on the Bank Officer's statements when  
10 they chose to enter into the loan agreement because those  
11 statements were made on February 9 and the agreement was dated  
12 February 1. BANA argues that the FAC does not correct this  
13 deficiency. The FAC does include as an exhibit email  
14 correspondence concerning the agreement suggesting that the  
15 agreement was signed later in February and backdated to February 1.  
16 (FAC Exh. 5.) However, the FAC does not specifically allege that  
17 date upon which the agreement was in fact signed, or that the  
18 parties agreed to backdate the agreement. Paragraph 30 states only  
19 that after the February 9 call, "Plaintiffs went ahead with  
20 concluding negotiations for the NRL, and entered into an agreement  
21 regarding the NRL with Defendant OCP. The agreement is dated  
22 effective as of February 1, 2012." Paragraph 30 thus implies  
23 without alleging specifically that the agreement was backdated.

24 Assuming arguendo that Plaintiffs have sufficiently alleged  
25 that the agreement was backdated, BANA also argues that any  
26 reliance was not justifiable. The court's Order stated: "simply  
27 because [Plaintiffs] failed to do adequate due diligence does not  
28 make the Bank Officer's statements fraudulent, and it makes their

1 alleged reliance on those statements less justifiable." (Order at  
2 19-20.) Plaintiffs assert in their Opposition to this Motion that  
3 they did due diligence with respect to the Oriana Defendants, and  
4 that this due diligence led them to "reasonably believ[e] the  
5 representations made by" the Bank officer. (Opp. at 5.)

6 The court finds that even if the FAC is read to allege that  
7 the agreement was backdated, Plaintiffs have still not alleged  
8 facts to show that any reliance was justifiable. The court's Order  
9 indicated that in the original Complaint Plaintiffs

10 d[id] not allege what kind of evidence the Bank Officer  
11 relied on in making his statements, nor d[id] they allege  
12 that they requested any supporting documentation from the  
13 Bank Officer or any additional information about his  
14 ability to comment on the Oriana Defendants' financial  
15 resources. Plaintiffs are purportedly sophisticated  
16 parties who owned complex securities and were represented  
17 by counsel in their transaction with Oriana.

18 (Order at 19.) Likewise, in the FAC, Plaintiffs have not alleged  
19 any such facts, nor have they alleged any other facts showing that  
20 reliance was justifiable. They allege only that they did due  
21 diligence with respect to the Oriana Defendants, but this does not  
22 amount to due diligence with respect to the Bank Officer and his  
23 representations, particularly when the representations that Oriana  
24 Defendants had sufficient financial resources were critical to  
25 Plaintiffs' decision to enter into the agreement. Ordinarily due  
26 diligence in such a situation would include requesting proof of the  
27 Oriana Defendants' financial resources or other factual bases upon  
28 which the Bank Officer relied for his representations.

## 2. Pleading with Particularity

The court's Order dismissed Plaintiffs' fraud-based claims for the additional reason that Plaintiffs failed to plead those claims with the level of particularity required by Rule 9(b). (Order at 20.) Specifically, the court indicated that "[m]erely because at a later time the Oriana Defendants did not disburse the loan funds and stated that they did not have the capacity to do so does not mean that the Bank Officer's statements about the Oriana Defendants' financial resources were untrue at that earlier time. . . [Plaintiffs] allege no facts to show that the Bank Officer had access to other information at the time of the phone call that would have contradicted his assessment of the Oriana Defendants' financial resources." (Id. at 20-21.)

Plaintiffs cite ¶¶ 22-44 and ¶¶ 115-51 of the FAC to demonstrate that they have now pleaded the fraud claims with particularity. The only paragraph that might be seen as being intended to cure the above-noted deficiency is ¶ 131, where Plaintiffs allege that "[w]hen BOA Bank Officer/John Doe 1 made the representations and statements alleged above, he knew these representations to be false." However, this conclusory allegation is not sufficiently particular to meet the pleading standard for fraud claims; indeed, it is a bare allegation with no particularity at all. There is no indication that Plaintiffs could amend so as to cure this deficiency.

Additionally, the court noted in the Order that in an amended complaint, Plaintiffs would need to present phone records establishing that the alleged call took place. (Order at 22 ("[a]ny amended pleading must attach and incorporate any telephone

1 records allegedly evidencing the telephone call in question.")  
2 Plaintiffs have failed to do so, despite the four months that have  
3 elapsed since the court's Order.

4 For these reasons, and because any amendment would be futile,  
5 the court DISMISSES the fraud-based claims without leave to amend.

6 **C. Conspiracy Claim**

7 As discussed in the court's Order, a plaintiff must "clearly  
8 allege specific action on the part of each defendant that  
9 corresponds to the elements of a conspiracy . . . . [The] plaintiff  
10 cannot indiscriminately allege that conspiracies existed between  
11 and among all defendants." AccuImage Diagnostics Corp. v.  
12 Terarecon, Inc., 260 F. Supp. 2d 941, 948 (N.D. Cal. 2003). In the  
13 court's Order, the court indicated that the conspiracy claim  
14 against Bank of America in the original Complaint was deficient  
15 because "[a]lthough the Bank of America Bank Officer is listed as a  
16 defendant under the heading for the conspiracy claim, the  
17 allegations do not specifically mention the Bank Officer's actions,  
18 and BAC is entirely absent from this claim. Plaintiffs therefore  
19 fail to allege any specific action on the part of any Bank of  
20 America defendants with respect to the alleged conspiracy." (Order  
21 at 23.) The FAC does not correct this deficiency. Again, BANA is  
22 not named at all in the conspiracy allegations.

23 Additionally, BANA argues that Plaintiffs' conspiracy claim  
24 fails because BANA does not owe Plaintiffs any underlying duty, and  
25 a conspiracy can "only be formed by parties who are already under a  
26 duty to the plaintiff, the breach of which will support a cause of  
27 action against them - individually and not as conspirators - in  
28 tort." Chavers v. Gatke Corp., 107 Cal. App. 4th 606, 614

1 (2003) (emphasis in original). Since the court found that  
2 Plaintiffs have not pleaded their fraud-based claims with  
3 sufficient particularity and dismissed those claims without leave  
4 to amend, the court also finds that Plaintiffs have not stated a  
5 claim for any duty owed by BANA to Plaintiffs and DISMISSES the  
6 conspiracy claim without leave to amend.

7 **IV. Conclusion**

8 For the reasons stated above, BANA's Motion to Dismiss is  
9 GRANTED. The FAC is dismissed in its entirety against BANA with  
10 prejudice.

11  
12 IT IS SO ORDERED.

13  
14  
15 Dated: June 7, 2013

  
DEAN D. PREGERSON  
United States District Judge